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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

October Term, 1964

No. 907

ABRAHAM DOBKIN, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Where an accused is not charged as a second offender, where the trial judge is not, prior to or during the trial, otherwise informed of his prior conviction for the same offense, and where the penalty imposed is no greater than that prescribed for a first offense, does the accused have the right to a trial by jury simply because Section 22-104, D. C.

Code, 1961, authorizes, upon a second conviction for any criminal offense punishable by fine or imprisonment or both, the imposition of "* * * a fine not exceeding fifty per centum greater, and * * * imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense"?

2. Whether the trial court, in denying petitioner's request for an adjournment of the trial, was justified in concluding from petitioner's own testimony and actions, as well as from other surrounding facts and circumstances, that there existed no valid religious basis for such an adjournment.

STATEMENT OF THE CASE

Petitioner was convicted in the District of Columbia Court of General Sessions of violating those provisions of the "Baby Broker's Act"[1] which read:

> "No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption. * * *" [Section 32-785, D. C. Code, 1961.]

Prior to trial, petitioner moved that his case be tried before a jury (R. 3). Although he had been previously convicted of the same offense, he was not charged as a second offender, he did not inform the court of such prior conviction, and he made no assertion that he was entitled to a jury trial by virtue of the fact that he was a second

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[1] Act of April 22, 1944, c. 171, s. 5, 58 Stat. 194, as amended by the Act of June 8, 1954, c. 273, s. 3, 68 Stat. 247 (Section 32-785, D. C. Code, 1961).

offender (R. 5-6). The motion was denied, and was not renewed at trial.

At trial, which, by agreement of counsel, had been scheduled to commence at 5:00 p. m. on Friday, December 14, 1962, petitioner, after being sworn as a witness, and subsequent to argument on and disposition of several motions, moved for an adjournment of the trial on the ground that his Sabbath had begun at 4:47 p. m. that evening (R. 9). The trial judge, following a hearing, denied the motion, concluding that it was made for purposes of delay (R. 16).

At the conclusion of the trial, petitioner was found guilty as charged, and a sentence of 90 days in jail and a fine of $300 was imposed (R. 55).

Petitioner appealed to the District of Columbia Court of Appeals, which affirmed the judgment of conviction (R. 60). The United States Court of Appeals for the District of Columbia Circuit allowed an appeal, and a division of that court affirmed the judgment of the District of Columbia Court of Appeals on the basis of the latter court's opinion in *Dobkin* v. *District of Columbia*, 194 A. 2d 657 (1963) (App. 7a).[2] A petition for rehearing en banc was denied—one judge dissenting (App. 8a).

REASONS WHY WRIT SHOULD BE DENIED

I

Petitioner was not entitled to a jury trial.

Section 16-705, D. C. Code (Supp. IV, 1965), provides, in pertinent part, that:

> "(b) In any case where the accused would not by force of the Constitution of the United States

[2] References to "App." refer to the Appendix contained in petitioner's brief.

> be entitled to a trial by jury, the trial shall be by the court without a jury, unless it is a case wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days and the accused demands a trial by jury. In the latter case the trial shall be by jury."

Petitioner makes no contention in this Court that he was entitled to a jury trial by virtue of the above statutory provision or by virtue of the Constitution of the United States. Instead, he asserts that he is a second offender, and, as such was entitled to a jury trial under Section 22-104, D. C. Code, 1961, which provides that:

> "Every person upon his second conviction of any criminal offense punishable by fine or imprisonment or both may be sentenced to pay a fine not exceeding fifty per centum greater, and to suffer imprisonment for a period not more than one-half longer than the maximum fine and imprisonment for the first offense."

Since the maximum fine and imprisonment for the first offense is $300 or 90 days or both, petitioner argues that Section 22-104, *supra*, increased the possible fine and imprisonment that could have been imposed upon him to $450 or 135 days or both, thereby bringing his case within the ambit of the jury trial provisions set forth in Section 16-705, *supra*.

If Section 22-104, *supra*, is to have any affect on one's right to a jury trial, the fact of a prior conviction must certainly be alleged in the information. Otherwise, the trial court is without the necessary facts to enable it to decide whether the possible penalty to which a particular accused may be subjected is such as to entitle him to a jury trial. Here, for example, the petitioner not only was neither

charged as nor sentenced as a second offender, but, in addition, when moving for a jury trial, he failed to disclose the fact of his prior conviction for the same offense, and failed to urge the applicability or even the existence of Section 22-104, *supra*. Under these circumstances, petitioner's contention that the trial court erred in failing to give due consideration to facts which were not called to its attention is clearly without merit. As the District of Columbia Court of Appeals so clearly pointed out in its well-reasoned opinion, which was adopted by the United States Court of Appeals:

> "* * * If a defendant is to be subjected to the fifty percent greater penalty under § 22-104, he is entitled to notice of this prior to trial. Any other ruling in a case like that presently before us would enable the government to deprive a defendant of the right to a jury trial by not requesting the added penalties until time of sentencing. * * *"

Oyler v. *Boles*, 368 U. S. 448, *Jordan* v. *United States District Court for Dist. of Col.*, 98 U. S. App. D. C. 160, 233 F. 2d 362, and *Jackson* v. *United States*, 95 U. S. App. D. C. 328, 221 F. 2d 883, relied upon by petitioner, are not apposite. *Oyler* v. *Boles* involved a multiple offender statute, and this Court held that, "* * * although the habitual criminal issue may be combined with the trial of the felony charge, 'it is a distinct issue, and it may appropriately be the subject of separate determination.' * * *" In the other cases cited, the accused was entitled to a jury trial irrespective of the fact that he was a second offender. Therefore, it was unnecessary, in the cases cited by petitioner, to allege in the indictment that the accused was a second offender, because such fact did not, in any respect, affect his rights under the substantive charge.

II

The record discloses no violation of petitioner's right to "religious freedom."

Petitioner contends that, by requiring him to proceed to trial on a Friday evening, the advent of his Sabbath, his constitutional rights were violated. A review of the record, however, discloses that no constitutional question is involved. All that is involved is the question of whether the trial judge abused her discretion in refusing to grant petitioner's eleventh-hour request for a continuance.

Petitioner's case had been continued a number of times. On December 13, 1962, when the case was scheduled for trial, appellant's attorney informed the court that he was engaged in another trial. At that time, because witnesses were in Washington from North Carolina for the trial, "* * * it was agreed that the trial would be held beginning at 5:00 P. M. on Friday, December 14." (See page 3 of petitioner's brief filed in the District of Columbia Court of Appeals.) Appellant's counsel failed to appear in court at 5:00 p. m., but, as a result of a telephone call to him from the trial judge, he appeared at 6:07 p. m. (R. 7). Petitioner, without registering any objection, was sworn as a witness (R. 8-9). Thereafter, following argument and disposition of a number of motions, petitioner moved for an adjournment of the trial, representing to the court that his Sabbath had commenced at 4:47 p. m. that evening, and that it would be a violation of his religious scruples to submit to trial at that time (R. 9).

The trial judge conducted a hearing upon the question at which it was disclosed that petitioner was of the reform or "liberal" Jewish faith; that petitioner had agreed to go to trial at 5:00 p. m. on Friday; that he made no objection to being sworn as a witness; that he apparently had no religious scruples against working in his law office on Satur-

days (R. 13, 14); and that the government's necessary witness would be returning to her home in North Carolina beyond the jurisdiction of the court (R. 16). Under these circumstances, the trial court properly concluded that petitioner's motion for adjournment of the trial was not based upon any religious conviction, but was made solely for the purposes of delay (R. 16). The District of Columbia Court of Appeals very aptly summed it up by saying:

> "* * * We would agree at once that no man ought to be required to violate his conscientious religious scruples by submitting to trial on a day he actually observes as one of worship. But here, inquiring into the situation, the trial court learned from appellant that he actually went to his office and worked on Saturdays, and was justified in concluding that there was no valid religious basis for putting the trial over to another day. Other circumstances, including the fact that the trial had been, without objection, reset for that day and hour, indicate that there was no prejudice in this situation" (R. 57).

From all of the foregoing, it appears, without any serious question, that petitioner has endeavored to convert a case of a purely local nature into one involving non-existing constitutional issues respecting his right to a jury trial and to the free exercise of his religion. Clearly, therefore, as this Court concluded in *United Surety Company* v. *American Fruit Product Company*, 238 U. S. 140, 142, 59 L. Ed. 1238, 1240, the "* * * constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. * * *"

CONCLUSION

It is respectfully submitted that the petitioner has presented no substantial and important question calling for re-

view by this Court, and that his petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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